

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 27, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LORIE D.

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:17-CV-00296-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 13, 14. Attorney Lora Lee Stover represents Lorie D. (Plaintiff); Special Assistant United States Attorney Jeffrey R. McClain represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

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STATEMENT OF FACTS

The facts of the case are set forth in the administrative hearing transcript, the ALJ’s decision, and the briefs of the parties. They are only briefly summarized here.

Plaintiff was 51 years old at the alleged date of onset. Tr. 258. Her highest level of education was the eighth grade completed in 1976. Tr. 293. Her reported work history includes the jobs of cashier, customer service representative, and laborer. Tr. 293. Plaintiff reported that she stopped working on December 1, 2003 because she was let go, but that her conditions became severe enough to keep her from working as of September 2, 2009. Tr. 292.

STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The Court reviews the ALJ’s determinations of law de novo,

STANDARD OF REVIEW

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1 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
2 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
3 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
4 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
5 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
6 another way, substantial evidence is such relevant evidence as a reasonable mind
7 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
8 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
9 interpretation, the court may not substitute its judgment for that of the ALJ.
10 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
11 findings, or if conflicting evidence supports a finding of either disability or non-
12 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
13 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
14 evidence will be set aside if the proper legal standards were not applied in
15 weighing the evidence and making the decision. *Browner v. Secretary of Health*
16 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

17 SEQUENTIAL EVALUATION PROCESS

18 The Commissioner has established a five-step sequential evaluation process
19 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen*
20 *v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of
21 proof rests upon the claimant to establish a prima facie case of entitlement to
22 disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once the
23 claimant establishes that physical or mental impairments prevent her from
24 engaging in her previous occupations. 20 C.F.R. § 416.920(a)(4). If the claimant
25 cannot do her past relevant work, the ALJ proceeds to step five, and the burden
26 shifts to the Commissioner to show that (1) the claimant can make an adjustment to
27 other work, and (2) specific jobs which the claimant can perform exist in the
28 national economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94

1 (9th Cir. 2004). If the claimant cannot make an adjustment to other work in the
2 national economy, a finding of “disabled” is made. 20 C.F.R. § 416.920(a)(4)(v).

3 **ADMINISTRATIVE DECISION**

4 On March 9, 2016, the ALJ issued a decision finding Plaintiff was not
5 disabled as defined in the Social Security Act.

6 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
7 activity since August 28, 2013, the amended date of onset. Tr. 24.

8 At step two, the ALJ determined Plaintiff had the following severe
9 impairments: degenerative disc disease – cervical and lumbar spine; cognitive
10 disorder; depressive disorder; anxiety disorder; pain disorder associated with
11 psychological factors and a general medical condition; personality disorder; and
12 alcohol and amphetamine dependence in remission. Tr. 24.

13 At step three, the ALJ found Plaintiff did not have an impairment or
14 combination of impairments that met or medically equaled the severity of one of
15 the listed impairments. Tr. 26.

16 At step four, the ALJ assessed Plaintiff’s residual function capacity and
17 determined she could perform a range of light work with the following limitations:

18 The claimant could lift no more than 20 pounds occasionally and lift or
19 carry 10 pounds occasionally; would have no limitation standing
20 walking, and sitting except she would need to change positions from
21 sitting to standing every hour for one minute; never climb ladders,
22 ropes, or scaffolds; should avoid concentrated exposure to heavy,
23 industrial vibration, and temperature extremes of heat and cold; could
24 understand, remember, and carry out simple routine work instructions;
25 could have superficial to occasional contact with the general public; no
work settings with large crowds; no independent decision-making; and
no fast-paced or strict production quota type work.

26 Tr. 28. The ALJ identified Plaintiff’s past relevant work as cashier, deli clerk, and
27 small stock facer and concluded that Plaintiff was not able to perform this past
28 relevant work. Tr. 36-37.

1 At step five, the ALJ determined that, considering Plaintiff's age, education,
2 work experience and residual functional capacity, and based on the testimony of
3 the vocational expert, there were other jobs that exist in significant numbers in the
4 national economy Plaintiff could perform, including the jobs of office helper, mail
5 clerk, photocopying machine operator, and small parts assembler. Tr. 37-38. The
6 ALJ concluded Plaintiff was not under a disability within the meaning of the Social
7 Security Act at any time from August 28, 2013, through the date of the ALJ's
8 decision. Tr. 38.

9 ISSUES

10 The question presented is whether substantial evidence supports the ALJ's
11 decision denying benefits and, if so, whether that decision is based on proper legal
12 standards. Plaintiff contends the ALJ erred by (1) failing to properly address
13 Plaintiff's symptom statements, (2) failing to make a proper residual functional
14 capacity determination, (3) failing to present an accurate hypothetical to the
15 vocational expert, and (4) failing to make a proper step five determination.

16 DISCUSSION

17 1. Plaintiff's Symptom Statements

18 Plaintiff contests the ALJ's determination that Plaintiff's symptom
19 statements were less than fully credible. ECF No. 13 at 11-13.

20 It is generally the province of the ALJ to make determinations regarding the
21 credibility of Plaintiff's symptom statements, *Andrews*, 53 F.3d at 1039, but the
22 ALJ's findings must be supported by specific cogent reasons. *Rashad v. Sullivan*,
23 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,
24 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear
25 and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v.*
26 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient:
27 rather the ALJ must identify what testimony is not credible and what evidence
28 undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

1 The ALJ found Plaintiff less than fully credible concerning the intensity,
2 persistence, and limiting effects of her symptoms. Tr. 29. The ALJ reasoned that
3 Plaintiff's statements were unreliable because her symptom reporting was contrary
4 to the objective medical evidence and her treatments appeared to improve the
5 severity of her symptoms. Tr. 33.

6 Plaintiff's challenge to the ALJ's determination consists of the assertion that
7 "the ALJ failed to provide clear and convincing reasons for discrediting Plaintiff's
8 subjective complaint testimony," and an assertion that she is credible. ECF No. 13
9 at 11-13. Nowhere does Plaintiff specifically point to any of the ALJ's reasons and
10 challenge them as an error of law or as not supported by substantial evidence. *Id.*
11 Plaintiff's argument amounts to an alternate interpretation of the evidence, which
12 is insufficient to succeed in a review by this Court. *Rollins v. Massanari*, 261 F.3d
13 853, 857 (9th Cir. 2001) (*citing Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989)
14 ("the ALJ's interpretation of her testimony may not be the only reasonable one.
15 But it is still a reasonable interpretation and is supported by substantial evidence;
16 thus, it is not our role to second-guess it.")).

17 Additionally, it is not the role of this Court to "manufacture arguments for
18 an appellant" and, therefore, the Court will not consider claims that were not
19 actually argued in Plaintiff's opening brief. *Greenwood v. Fed. Aviation Admin.*,
20 28 F.3d 971, 977 (9th Cir. 1994). The Ninth Circuit has explained the necessity for
21 providing specific arguments:

22 The art of advocacy is not one of mystery. Our adversarial system relies
23 on the advocates to inform the discussion and raise the issues to the
24 court. Particularly on appeal, we have held firm against considering
25 arguments that are not briefed. But the term "brief" in the appellate
26 context does not mean opaque nor is it an exercise in issue spotting.
27 However much we may importune lawyers to be brief and to get to the
28 point, we have never suggested that they skip the substance of their
argument in order to do so. It is no accident that the Federal Rules of
Appellate Procedure require the opening brief to contain the

1 “appellant’s contentions and the reasons for them, with citations to the
2 authorities and parts of the record on which the appellant relies.” Fed.
3 R. App. P. 28(a)(9)(A). We require contentions to be accompanied by
4 reasons.

5 *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003).¹

6 Because Plaintiff failed to provide adequate briefing challenging the reasons
7 provided by the ALJ for rejecting Plaintiff’s testimony, the court declines to
8 consider the issue further.

9 **2. Residual Functional Capacity**

10 Plaintiff argues that the ALJ “ignored the Plaintiff’s limitations regarding
11 her pain and the effects of her impairments in terms of her ability to maintain
12 attendance and work effectively during an eight hour day.” ECF No. 13 at 13-14.
13 She further asserts that the ALJ “inappropriately considered the evidence from the
14 Plaintiff’s forty day work assessment at Goodwill Industries – especially in light of
15 her need for a sit/stand opinion,” and that the ALJ failed to consider “the objective
16 medical evidence of her orthopedic impairments and the effects of her pain
17 disorder which he acknowledged in Finding of Fact Number Two.” *Id.* at 14.

18 The ALJ’s residual functional capacity determination includes a sit/stand
19 requirement: “she would need to change positions from sitting to standing every
20 hour for one minute.” Tr. 28. In making the residual functional capacity
21 determination, the ALJ considered the report from Plaintiff’s supervisor at
22 Goodwill Industries and the observations this supervisor made concerning her
23 ability to sit and stand throughout her shift. Tr. 32. The ALJ gave partial weight
24 to this opinion because this supervisor observed Plaintiff during her shift. *Id.*
25 Plaintiff makes no additional argument in her briefing as to how the ALJ
26 inappropriately addressed this evidence. ECF No. 13 at 13-14. Considering it was

27 ¹Under the current version of the Federal Rules of Appellate Procedure, the
28 appropriate citation would be to FED. R. APP. P. 28(a)(8)(A).

1 addressed by the ALJ, the ALJ assigned it partial weight, and the ALJ included a
2 sit/stand requirement in the residual functional capacity determination, this Court
3 declines to find error in the ALJ's treatment of this evidence.

4 Plaintiff's challenge of the ALJ's treatment of the orthopedic impairments
5 and the effects of her pain disorder lacks specifics. The ALJ included orthopedic
6 impairments and pain disorder as severe impairments at step two. Tr. 24 (finding
7 Plaintiff's degenerative disc disease – cervical and lumbar spine and pain disorder
8 associated with psychological factors and a general medical condition as severe
9 impairments). The ALJ then included physical limitations in the residual
10 functional capacity determination. Tr. 28 (limiting Plaintiff to light work with a
11 requirement to change positions from sitting to standing every hour and precluding
12 climbing ladders, ropes, or scaffolds). Plaintiff failed to allege any additional
13 restrictions necessary to accommodate Plaintiff's orthopedic impairments and pain
14 disorder. ECF No. 13 at 13-14. Without a more specific argument by Plaintiff, the
15 Court cannot consider the issue further and finds that the ALJ did not error. *See*
16 *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008)
17 (“We do not address this finding because [Plaintiff] failed to argue this issue with
18 any specificity in his briefing.”).

19 **3. Hypothetical to Vocational Expert**

20 Plaintiff alleges that the hypothetical question posed by the ALJ was
21 incomplete. ECF No. 13 at 15. She states that Dr. Winfrey rated Plaintiff as
22 having a moderate degree of limitation in terms of concentration, persistence and
23 pace and opined that Plaintiff would need a work environment that would include
24 simple, routine and repetitive tasks and agrees that these limitations were
25 incorporated into the residual functional capacity determination. *Id.* However, she
26 asserts that Dr. Winfrey also found that Plaintiff had a limited ability to learn new
27 tasks which was not included in the hypothetical posed to the vocational expert.
28 *Id.* She additionally asserts that Perry Grey, Psy.D., John F. Arnold, Ph.D., and the

1 report from the Department of Vocational Rehabilitation (DVR) included
2 limitations in her ability to learn new tasks and it was an error for the ALJ to leave
3 this limitation out of the hypothetical presented to the vocational expert. ECF No.
4 13 at 16.

5 At the hearing, Dr. Winfrey provided testimony regarding Plaintiff's residual
6 functional capacity and opined that Plaintiff could understand, remember and carry
7 out simple routine work instructions, Tr. 83, was limited to superficial to
8 occasional contact with the public with a preclusion from crowds, Tr. 84, was
9 precluded from independent decision making, Tr. 85, and was precluded from fast
10 pace or strict production-type work, Tr. 87. Dr. Winfrey did not testify that
11 Plaintiff had a limitation in her ability to learn new tasks. Tr. 78-89. The ALJ
12 gave Dr. Winfrey's opinion great weight. Tr. 36. Plaintiff did not challenge the
13 weight the ALJ provided to Dr. Winfrey's opinion. ECF No. 13 at 15. Seeing as
14 Plaintiff's argument is not supported by the record and she failed to challenge the
15 weight assigned to the opinion, this Court cannot disturb the ALJ's treatment of the
16 opinion.

17 Dr. Grey examined and tested Plaintiff in August of 2014 and provided an
18 opinion regarding her functioning on September 19, 2014. Tr. 500-11. In his
19 opinion, he included the following statement: "Firstly, she would require frequent
20 repetition of material, written cues, and supervised practice and application of
21 learned concepts. Ms. Delafield will struggle with learning new concepts,
22 therefore these learning supports are recommended." Tr. 511. The ALJ gave Dr.
23 Grey's opinion less weight because "he did not offer an opinion on how the
24 claimant's symptoms would interfere with her ability to work," and because "his
25 opinion on the severity of the claimant's symptoms is considerably more drastic
26 than the majority of the acceptable and non-acceptable medical source opinions in
27 the record." Tr. 34. Plaintiff did not challenge the weight the ALJ assigned to Dr.
28 Grey's opinion. ECF No. 13. Therefore, the Court will not consider the issue

1 further. *See Carmickle*, 533 F.3d at 1161 n.2.

2 On January 28, 2016, Dr. Arnold completed an evaluation for the
3 Washington Department of Social and Health Services. Tr. 625-28. He diagnosed
4 Plaintiff with a rule out neurocognitive disorder, a persistent depressive disorder
5 with late onset, generalized anxiety disorder, and unspecified personality disorder.
6 Tr. 626. He rated Plaintiff's limitation in thirteen basic work activities which
7 included a marked limitation in three basic work activities, including in the ability
8 to learn new tasks, and a severe limitation in two additional basic work activities.
9 Tr. 627. The ALJ gave no weight to Dr. Arnold's opined severe limitations and
10 stated that "[t]he claimant did not report any of her recent activities to Dr. Arnold,
11 and her misinformation regarding her sobriety suggests that his conclusions are
12 based at least in part on faulty information." Tr. 36. The ALJ did not specifically
13 address the weight he assigned to the marked limitations opined by Dr. Arnold. *Id.*
14 Plaintiff argues that the marked limitation in the ability to learn new tasks was
15 supported by substantial evidence and should have been included in the
16 hypothetical presented to the vocational expert. While the ALJ did not specifically
17 reject the limitation in the ability to learn new tasks, the Ninth Circuit has
18 recognized that the ALJ is not required to use "magic words" to achieve his
19 analysis, as long as the Court can draw specific and legitimate inferences from his
20 findings. *Magallanes*, 881 F.2d at 755. Here, Plaintiff failed to assert any
21 challenge to the weight the ALJ impliedly or expressly gave to Dr. Arnold's
22 opinion or any reason the ALJ provided for such weight. ECF No. 13. Again, this
23 Court will not manufacture arguments for Plaintiff. *See Greenwood*, 28 F.3d at
24 977.

25 Plaintiff also asserts that the limitation in learning new tasks was addressed
26 by the DVR report dated June 9, 2015. ECF No. 13 at 16. However, the supports
27 and accommodations recommended in the report did not specifically address the
28 ability to learn new tasks. Tr. 364-65. Instead, it addressed the need for extra

breaks, a quiet place to calm herself, encouragement/positive feedback, extra supervision, assistance with decision making/problem solving, assistance with anxiety and stress, assistance with instructions and complex processes, assistance with repetitive skills and work assignments, assistance with work tolerance and adjusting to work environment, assistance with focus concerns and repetitive instructions, assistance with social cues/personal boundaries, and the need for protective equipment. *Id.* The ALJ assigned partial weight to these recommendations, Tr. 32, and Plaintiff did not challenge the assigned weight, ECF No. 13. While a reasonable interpretation of these recommendations could include a limitation in the ability to perform new tasks, this is simply an interpretation. It is the ALJ's role to resolve any ambiguities, *Andrews*, 53 F.3d at 1039, and it is not the Court's role to second guess a reasonable interpretation of the evidence. *Rollins*, 261 F.3d at 857. The Court finds that the ALJ's residual functional capacity determination is also a reasonable interpretation of the recommendations, and since Plaintiff failed to challenge the weight assigned to the recommendations, this Court will not disturb the residual functional determination. Therefore, the Court declines to find error in the hypothetical given to the vocational expert that matched the ALJ's residual functional capacity determination. Tr. 115-16.

4. Step Five

Plaintiff's step five argument is premised on the Court finding the ALJ erred in the residual functional capacity determination and in the hypothetical provided to the vocational expert. ECF No. 13 at 14-16. Because the Court did not find the ALJ erred in relation to either of these arguments, the step five determination is also without error.

CONCLUSION

Having reviewed the record and the ALJ's findings, the Court finds the ALJ's decision is supported by substantial evidence and free of legal error.

Accordingly, **IT IS ORDERED:**

1 1. Defendant's Motion for Summary Judgment, **ECF No. 14**, is
2 **GRANTED.**

3 2. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **DENIED.**

4 The District Court Executive is directed to file this Order and provide a copy
5 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant**
6 **and the file shall be CLOSED.**

7 **IT IS SO ORDERED.**

8 DATED June 27, 2018.

A handwritten signature in black ink, appearing to be "M" followed by a stylized flourish.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE